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Jean-François Gaudreault-DesBiens

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The “Principle of Federalism” and the Legacy of the *Patriation* and *Quebec Veto* References

Jean-François Gaudreault-DesBiens*

“You know the thing about Canada is it’s a federal country.”¹

I. INTRODUCTION

Possibly more than any other case of the late 1970s and early 1980s, *Re: Resolution to amend the Constitution*² revealed deep disagreements within the Supreme Court as to the nature of Canadian federalism, the normative consequences, if any, that can or should be drawn from the *principle* of federalism, and the interplay between formal law and informal law in adjudicating federalism-related cases.

This paper argues that the Court’s rulings in federalism cases since the *Patriation Reference*, including the follow-up case of *Reference re Amendment of Canadian Constitution*,³ have not really clarified these areas of penumbra. In Part II, I examine the divergent conceptions of federalism observable in the *Patriation* and *Quebec Veto* references. I focus, in Part III, on the justices’ differing views on the usefulness and justiciability of the principle of federalism in post-*Patriation Reference* cases, notably by highlighting how they themselves use the two references

* Associate Dean, Research, and Canada Research Chair in North American and Comparative Juridical and Cultural Identities, Faculty of Law, University of Montreal. All rights reserved, Gaudreault-DesBiens, 2011. I would like to thank Geneviève Beausoleil-Allard for the most helpful background research she did for this paper, my colleague and friend Jean Leclair for his insightful comments on a preliminary version of it, and, finally, Jamie Cameron and Bruce Ryder for their equally helpful suggestions. The usual disclaimer applies.

¹ Chief Justice Brian Dickson in a conversation with Patrick Monahan, as quoted in Robert J. Sharpe & Kent Roach, *Brian Dickson: A Judge’s Journey* (Toronto: Osgoode Society, 2003), at 269.

² *Reference re Amendment of Constitution of Canada*, [1981] S.C.J. No. 58, [1981] 1 S.C.R. 753 (S.C.C.) [hereinafter “*Patriation Reference*”].

³ [1982] S.C.J. No. 101, [1982] 2 S.C.R. 793 (S.C.C.) [hereinafter “*Quebec Veto Reference*”].

that serve as springboards for this inquiry. Part IV then reveals, on the one hand, the conspicuous absence of any strong consensus on the normative consequences that flow, or should flow, from the principle of federalism, and, on the other, that the legacy of the early 1980s references, if any, remains one of conflict rather than one of consensus. I conclude that in a divided society with a weak common identity such as Canada, this outcome is almost inevitable.⁴ However, I also argue that a common syntax of federalism, revolving around core values underlying the federal principle, could help buttress the quality of reasons invoked in support of rulings made about the formal division of powers and, as a result, the quality (understood here in terms of balance, consistency, and openness to the diversity of perspectives on federalism) of federative adjudication in the Canadian federation.

An important caveat must be made as to the objective and scope of this paper. Indeed, it solely focuses on post-*Patriation Reference* cases in which *general ideas* are uttered about federalism as a *principle*. It thus ignores other cases where the analysis essentially remained in the technical realm of the legal interpretation of the formal distribution of powers, without ever referring to the federal principle. Neither does it seek to reveal the possibly deliberate *non-dits*, or silences, of such cases. For example, the Supreme Court's ruling in *Ward*⁵ offers a largely technical account, grounded on an analysis of the interplay between the federal jurisdiction over fisheries and the provincial jurisdiction over property and civil rights, of a case dealing with the sale of seal pelts. In overturning the Newfoundland Court of Appeal's prior judgment through the adoption of this technical-legal grid, the Court ends up obscuring the identity concerns raised by the majority opinion in the appellate court's judgment, which inform its grasp of the interplay between the competing federal and provincial jurisdictions at stake.⁶ There is thus a *non-dit* in the Supreme Court's ruling, but this *non-dit* somehow speaks volumes since its object — in the case at bar, the iteration by Newfoundland's Court of Appeal of an identity narrative represented as peculiar to the

⁴ Obviously, it does not mean that conflicts are not a common feature of other less *a priori* fragmented societies. Reflecting on justice in modern democratic societies, sociologist Alain Touraine argues that justice results from compromises, as opposed to consensuses, his premise being that social conflict rather than cooperation should be the springboard of social thought. See Alain Touraine, *Qu'est-ce que la démocratie?* (Paris: Fayard, 1994), at 55, 90.

⁵ *Ward v. Canada (Attorney General)*, [2002] S.C.J. No. 21, [2002] 1 S.C.R. 569 (S.C.C.).

⁶ *R. v. Ward*, [1999] N.J. No. 336, 182 D.L.R. (4th) 172 (Nfld. C.A.).

province *and* relevant in constitutional interpretation — may also hide a particular conception of federalism, or vision of the Canadian federation. The choice of not revealing and further examining such *non-dits* merely speaks to the particular objective of this paper, which is to purposively simplify the law of federalism so as to focus on the principle of federalism as seemingly understood by the Supreme Court of Canada.

A second caveat must be made about the temptation to situate any analysis of the federalism jurisprudence of the Supreme Court of Canada within the old “centralization versus decentralization” debate. I intend to do my best to resist that temptation. First, this debate is Manichean. For example, some constitutional scholars, mostly from Quebec, tend to adopt, explicitly or not, the grid “decentralization equals good: centralization equals bad”, while others, mostly from other provinces, are inclined to privilege an exactly reverse but equally predictable grid. With all due respect, this is a bit short, intellectually speaking. Second, and this flows from my first observation, any conclusion about centralization or decentralization often implies adopting a perspective about what, normatively speaking, Canada should be as a nation, rather than what federalism may legally imply, or even demand, in the Canadian context. Granted, absolute neutrality is illusory in such matters, but it bears noting that a normative perspective on Canada and one of federalism, legally understood, are not exactly similar. Arguably, the former is more likely to lead one to systematically value decentralization or centralization over the other, exactly as if decentralization or centralization were abstractly valuable for their own sake. In my view, the claim that decentralization or centralization is intrinsically good is intellectually indefensible, at least in the legal realm, because it is not an argument, it is merely a belief.⁷ Actually, both decentralization and centralization may be appropriate in certain circumstances, and problematic in others. I thus take intellectual automatisms such as “more powers to the provinces” or “more powers to the federal government” to be nothing but epistemological obstacles.⁸ This is why they need to be resisted, which does not mean

⁷ On the weakness of the argument that decentralization is abstractly beneficial, see R. Howse, “Federalism, Democracy, and Regulatory Reform: A Skeptical View of the Case for Decentralization” in K. Knop *et al.*, eds., *Rethinking Federalism: Citizens, Markets, and Governments in a Changing World* (Vancouver: UBC Press, 1995), 273.

⁸ On the notion of “epistemological obstacle”, see Gaston Bachelard, *La formation de l’esprit scientifique. Contribution à une psychanalyse de la connaissance objective*, 12th ed. (Paris: Vrin, 1983).

that *stronger reasons* leading to a “centralizing” or “decentralizing” outcome, as appraised from an external political perspective,⁹ cannot be entertained or even adopted.

It is therefore in light of these two caveats that this paper should be read, and that any tentative conclusion on my part on whatever question addressed in it should be appraised.

II. CONCEPTIONS OF FEDERALISM IN THE EARLY 1980S REFERENCES

Let me briefly examine the various conceptions of federalism revealed in the *Patriation Reference* and *Quebec Veto Reference*.

Recall, first, that a little before the *Patriation Reference*, the Supreme Court had issued an advisory opinion in *Reference re Legislative Authority of the Parliament of Canada in Relation to the Upper House*,¹⁰ where it entertained various arguments about Parliament’s power to unilaterally alter the composition and even the existence of the Senate. This hypothesis was rejected, *inter alia* on the basis of its incompatibility with the “federal” character of Parliament. After commenting that the federal unilateral power had been confined to “federal ‘housekeeping’” matters, the Court noted:

The legislation contemplated in [the Senate reference] is of an entirely different character. While it does not directly affect federal-provincial relationships in the sense of changing federal and provincial legislative powers, it does envision the elimination of one of the two Houses of Parliament, and so would alter the structure of the federal Parliament to which the federal power to legislate is entrusted under s. 91 of the Act.¹¹

Even before the early 1980s references, the Supreme Court had rejected in *Blaikie* the argument that the province of Quebec could legislate, as far as its own legislature and judiciary were concerned, against the letter of section 133 of the *British North America Act* (as the *Constitution Act, 1867* was then called)¹² which, among other things, solely

⁹ For a most useful study of such perspectives, see R. Simeon, “Criteria for Choice in Federal Systems” (1983) 8 Queen’s L.J. 131 [hereinafter “Simeon”].

¹⁰ [1979] S.C.J. No. 94, [1980] 1 S.C.R. 54 (S.C.C.).

¹¹ *Id.*, at 65-66.

¹² *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

imposed bilingualism on that province and on Parliament, at the exclusion of other provinces.¹³ More precisely, as far as Quebec was (and still is) concerned, this obligation applied to its legislature, its records and journals, the publication and printing of the Acts adopted by it, as well as the province's judiciary. In a nutshell, the province sought, in a series of provisions of the *Charter of the French Language*,¹⁴ to make French the only official language of the legislature and courts, thus restricting the right to use English, or its status, in both areas. Its argument was essentially grounded upon its power to amend its own constitution, but the Court dismissed it, arguing that even though this constitutional obligation of bilingualism was only imposed on Quebec and Parliament, this obligation enshrined a political agreement that was somehow constitutive of Canada itself and that transcended the interests of the particular province upon which these specific obligations were imposed. Accordingly, these obligations were beyond the legislative reach of the Quebec National Assembly since section 133 was part of the "Constitution of Canada" rather than part of the constitution of the province.

Federalism was not predominantly at stake in *Blaikie*, but the Supreme Court's implicit reference, through the adoption of Deschênes J.'s historical narrative in the judgment below, to a covenant deemed to be constitutive of the Canadian "federal union" certainly speaks to a certain conception of that union and constitutes a recognition of the partly contractarian dynamic inherent to federalism, which may be acknowledged even when formal constitutional provisions do not clearly reveal it.

In any event, like Banquo's ghost in Shakespeare's *Macbeth*, it would return to the fore, and glowingly so, in the *Patriation Reference*.¹⁵ The dispute at the heart of this reference was whether the federal government was required to secure provincial consent prior to amendments that would later lead to the *Constitution Act, 1982*,¹⁶ given the deadlocked negotiations with provinces.

A seven-judge majority summarily dismissed the legal argument, arguing, in essence (1) that compact theories, in whatever variation, were not relevant, or only marginally so, to the interpretation of a British law,¹⁷

¹³ *Blaikie v. Quebec (Attorney General)*, [1979] S.C.J. 85, [1979] 2 S.C.R. 1016 (S.C.C.) [hereinafter "*Blaikie*"].

¹⁴ R.S.Q., c. C-11.

¹⁵ *Supra*, note 2.

¹⁶ *Constitution Act, 1982*, being Schedule B of the *Canada Act, 1982* (U.K.), 1982, c. 11.

¹⁷ *Supra*, note 2, at 803-804.

(2) that no particular normative consequence could be drawn from the reference in the preamble of the *British North America Act* to a “federal union” and that such consequences should instead be drawn from the enunciation of the normative part of the Act’s formal text¹⁸ (3) that, accordingly, no “standardized” conception of a federal regime could allow one to infer such consequences¹⁹ (4) that the internal division of powers does not have any external impact, and (5) that the federal characteristics of Canada were not jeopardized by the federal initiative examined by the Court. For their part, Martland and Ritchie JJ., dissenting, would have found inspiration in the federal principle to draw the conclusion that, in the context of a constitutional amendment impacting on provincial powers, sovereignty in Canada was exercisable only through the joint expression of the federal Parliament and of the provincial legislatures.²⁰

However, a differently constituted six-judge majority, which broadly understood the Canadian Constitution as a global system of rules and principles governing the allocation and exercise of constitutional powers within the Canadian state and within each of its parts, held that there was a constitutional convention requiring a “substantial degree of provincial consent” since the proposed amendments “directly affected federal-provincial relationships in the sense of changing provincial legislative powers”. They found that the reason for this convention was to be found in the federal principle.²¹ Even if Canada would remain a federation were the amendments envisaged by the federal government adopted, that federation would have changed and, absent provincial consent, such a process went against constitutional conventions. A minority of three judges argued, on the contrary, that the alleged convention would unduly limit the sovereign powers of the federal executive and legislative branches,²² and that the particular type of federalism that was created by the *British North America Act* granted a form of supremacy to Parliament, as opposed to what is found in other federations.

Thus, on the legal issue, the majority resorts to a positivist-literalist understanding of the *British North America Act* in its refusal to rely on a generically defined federal principle as a potential interpretive-normative

¹⁸ *Id.*, at 806.

¹⁹ *Id.*

²⁰ *Id.*, at 847.

²¹ *Id.*, at 905.

²² *Id.*, at 859.

and legally binding source.²³ Three of the judges comprised in this majority, Laskin C.J.C., and Estey and McIntyre JJ., express a dissenting opinion on the conventional argument, essentially to the same effect: resorting to a form of Canadian exceptionalism,²⁴ they are of the view that the very nature of Canadian federalism gave Parliament a pre-eminent position within the federation. Transposing the “no standard federalism” argument into the conventional analysis, they refuse to draw normative consequences, even in the political realm, from an abstract, generically defined, principle of federalism.

On the legitimacy of the use of a more abstract conception of federalism as an interpretive-normative source, we therefore get the following picture: three judges (Laskin, Estey and McIntyre JJ.) are consistently and staunchly against it in both legal and conventional realms, while two judges (Martland and Ritchie JJ.) support it in both realms. The four remaining judges (Dickson C.J.C., Beetz, Chouinard and Lamer JJ.) support it only in the conventional realm. Of course, these positions were not necessarily determinative of what all these judges did in later cases arising out of different contexts. Yet, two dominant conceptions of federalism arguably emerge from these various opinions, irrespective of the actual justiciability of the normative source involved. Interestingly, these two conceptions are somewhat reminiscent of the ones competing in the old Privy Council’s case of *Hodge*.²⁵

The first one, which could be characterized as Laskinian, conceives of the federation as a governmental structure in which the federal government is at the helm and where provinces are subordinated to its will, at least in most important respects. The primordial and transcendent political community is thus the pan-Canadian one, which coincidentally happens to be segmented into provinces. This is what could be called a *positivist-voluntarist* conception of federalism, where the will inspiring the creation of the polity is deduced from the formal statute creating the

²³ William R. Lederman characterized, correctly in my view, the majority opinion as “narrowly positivistic and historically static”. See W.R. Lederman, “The Supreme Court of Canada and Basic Constitutional Amendment” in K. Banting & R. Simeon, eds., *And No One Cheered: Federalism, Democracy and the Constitution Act* (Toronto: Methuen, 1983), at 180.

²⁴ The word “exceptionalism” was coined by sociologist Seymour Martin Lipset to describe one of the defining features of American political ideology. See generally Seymour Martin Lipset, *American Exceptionalism: A Double-Edged Sword* (New York: W.W. Norton & Co., 1996).

²⁵ *Hodge v. R.* (1883) 9 A.C. 117 (J.C.P.C.).

federation²⁶ and from a predetermined conception of the federation where the federal government has the sole power to determine where the national interest lies and to define what the federal common good is. It is, in a nutshell, a Canadian nationalist conception of federalism. An alternative account of that positivist-voluntarist conception of federalism could be that the formal statute, as unclear as it may sometimes be, is nevertheless *reified* and *instrumentalized* to buttress such a nationalist interpretation of Canadian federalism. It is thus more than a mere literalist conception of federalism that is at stake here — hence, the emphasis on voluntarism. Indeed, the textual anchor provided by the *Constitution Act, 1867* is way too loose to solidly ground any persuasive literal argument supporting that particular vision of federalism, or, for instance, any competing one.

The second one, which I would call *generic-historicist*, envisages federations as structures where the federal and federated levels of government are co-equals, and coincidentally finds that such is the case with the Canadian federation in spite of some explicit provisions to the contrary, which are somehow treated (and then obscured) as unpleasant normative facts. Although this conception of federalism can hardly aspire to a greater level of axiological neutrality than the previous one, its assumption of co-equality between the two levels of government does not entail that legitimate decision-making implies unanimity, even where

²⁶ The following quotation illustrates that positivist approach:

At the risk of undue repetition, the point must again be made that constitutionalism in a unitary state and practices in the national and regional political units of a federal state must be differentiated from constitutional law in a federal state. Such law cannot be ascribed to informal or customary origins, but must be found in a formal document which is the source of authority, legal authority, through which the central and regional units function and exercise their powers.

The constitution of Canada, as has been pointed out by the majority, is only in part written, *i.e.* contained in statutes which have the force of law and which include, in addition to the *British North America Act* (hereinafter called the *B.N.A. Act*), the various other enactments which are listed in the reasons of the majority. Another, and indeed highly important, part of the constitution has taken the form of custom and usage, adopting in large part the practices of the Parliament of the United Kingdom and adapting them to the federal nature of this country. These have evolved with time to form with the statutes referred to above and certain rules of the common law a constitution for Canada. This constitution depends then on statutes and common law rules which declare the law and have the force of law, and upon customs, usages and conventions developed in political science which, while not having the force of law in the sense that there is a legal enforcement process or sanction available for their breach, form a vital part of the constitution without which it would be incomplete and unable to serve its purpose.

See *Patriation Reference*, *supra*, note 2, at 852-53.

federal-provincial relationships are affected “in the sense of changing provincial legislative powers”. By *not* finding that unanimous provincial consent was needed on the proposed federal amendments, the judges adopting that position held that legitimacy in a federation is contextual and ultimately raises questions of reasonableness and proportionality. They thus imposed limits on the potential reach of provincial federalism-based arguments, as they had imposed limits on the hegemonic ambitions of the federal government when it came to amending the Constitution. By so doing, they affirmed a conception of the federation that took stock of its irreducibility, as a sovereign legal entity, to any of the orders of government, and to the need to prevent its instrumentalization by any such order of government.

The refusal to impose provincial unanimity as a benchmark for a constitutional amendment of the magnitude of that envisaged implied that no particular province could alone pretend to have a right of veto over the process. *As far as the convention based on the federal principle was concerned*, the only requirement was a quantitative one of substantial consent. This raised the question of the possibility of qualitative requirement, and that question was examined in the 1982 *Quebec Veto Reference*.²⁷

In this reference, Quebec argued that the province had a conventional veto over the amending process which was grounded on the principle of Canadian duality as understood in its “Quebec dimension”, that is, taking into consideration that several historical and contemporary social facts bore witness to the distinctiveness of Quebec society within the federation.²⁸ The Supreme Court did not feel compelled to examine this argument, because it had earlier found that there was no evidence that the relevant constitutional actors had accepted or recognized a consistent political practice of a Quebec veto over any constitutional amendment affecting its powers. The problem is that by so deciding, the Court imposed a higher evidentiary standard than it had done in the *Patriation Reference*, where it had acknowledged that acceptance of a conventional rule could be merely inferred from constitutional practice. Normatively speaking, the Court would have arguably been on stronger ground had it decided to resort to the principle of federalism to reject the idea that a single federated unit, albeit significantly different from the others

²⁷ *Supra*, note 3.

²⁸ *Id.*, at 812-13.

sociologically and historically, enjoyed an unqualified veto over constitutional amendments. Of course, such an argument would have been debatable, but it would at least have been straightforward and thus less open to accusations of bias.²⁹

The Court's opinion in the *Quebec Veto Reference* badly bruised its image in this province, to such an extent that "the general court of appeal for Canada instantly became 'la Cour des Autres' (the Others' Court)".³⁰ This came about not only as a result of what was perceived as a judicially created double standard, but also as a result of the Court's implicit burial of Quebec's dominant bi-national narrative of the federation, after its prior rejection, as "non-judicial", of the compact theory in the *Patriation Reference*.³¹ For many Quebecers, it was the beginning of the end of a certain Canadian dream, to paraphrase political scientist Guy Laforest,³² and all Canadians are still living with the political-constitutional consequences of this burial. That one does not personally subscribe to the victimization narrative that has become widespread in Quebec since 1982 should not prevent him or her from seeing that there still is a lot of water in the basement of the Canadian house.

III. AN AMBIGUOUS STANCE ON THE USEFULNESS AND JUSTICIABILITY OF THE PRINCIPLE OF FEDERALISM AS AN INTERPRETIVE LEGAL CONCEPT

Can the idea of federalism, envisaged from the standpoint of its normative potential, be relied upon to privilege one interpretation of the formal division of powers over another? As was just seen, the *Patriation*

²⁹ On these questions, see M.E. Gold, "The Mask of Objectivity: Politics and Rhetoric in the Supreme Court of Canada" in E. Belobaba & E. Gertner, eds. (1985) 7 S.C.L.R. 455. For a strong defence of asymmetry in multinational federations, see Alain-G. Gagnon, *Au-delà de la nation unificatrice: plaidoyer pour le fédéralisme multinational* (Barcelona: Institut d'Estudis Autònoms, 2007).

³⁰ S. Choudhry & J.-F. Gaudreault-DesBiens, "Frank Iacobucci as Constitution-Maker: From the Quebec Veto Reference, to the Meech Lake Accord and the Quebec Secession Reference" (2007) 57 U.T.L.J. 165, at 178. Legal philosopher Alexandre Kojève argues that the intervention of a disinterested third party is at the root of the very idea of justice and that it is constitutive of the law itself. See Alexandre Kojève, *Esquisse d'une phénoménologie du droit* (Paris: Gallimard, 1981), at 24. From that perspective, the very perception of an interest on the part of the third party suffices to undermine its decisions and, more broadly, one's perception of the law and of its legitimacy.

³¹ *Patriation Reference*, *supra*, note 2, at 803-804.

³² Guy Laforest, *Trudeau and the End of a Canadian Dream* (Montreal and Kingston: McGill-Queen's University Press, 1995).

Reference evinced a certain malaise within the Supreme Court as to the usefulness and even the justiciability of the principle of federalism as a normative-interpretive concept. What happened next? The Supreme Court’s case law is inconclusive at best. Indeed, some opinions seem to vest this principle with a normative content, while others ignore it or deny its relevance.

Two rulings clearly reject the relevance of relying on the principle of federalism for the purpose of interpreting a constitutional provision or for framing a debate about the validity of a federal unilateral action significantly affecting provincial interests.

In *Beauregard v. Canada*,³³ the Supreme Court had to examine the constitutionality of a federal statute imposing upon superior court judges an obligation to contribute to their pension fund. A generic, federalism-based argument was made in view of persuading the Court that the modification contemplated actually required a constitutional amendment supported by the appropriate degree of provincial consent. Rejecting this argument, the Supreme Court held that the non-ambiguous nature of the applicable constitutional provisions rendered irrelevant any reliance on a broader federalism-based argument. That being said, it bears noting that these constitutional provisions were only peripherally connected with provincial interests, and that the impact of the modification contemplated could not seriously be characterized as raising significant questions from the standpoint of the federation’s equilibrium.

The situation was quite different in the *Canada Assistance Plan Reference*,³⁴ in which the Supreme Court had to rule on the constitutionality of a federal statute unilaterally capping the federal government’s financial contribution to some provinces under the Canada Assistance Plan. A generic federalism-based argument had been made about the negative externalities that this unilateral federal action had imposed upon the provinces. Speaking for the entire Court, Sopinka J. summarily dismissed that argument:

This was the argument that the “overriding principle of federalism” requires that Parliament be unable to interfere in areas of provincial jurisdiction. It was said that, in order to protect the autonomy of the provinces, the Court should supervise the federal government’s exercise

³³ [1986] S.C.J. No. 50, [1986] 2 S.C.R. 56 (S.C.C.).

³⁴ *Reference re Canada Assistance Plan (British Columbia)*, [1991] S.C.J. No. 60, [1991] 2 S.C.R. 525 (S.C.C.) [hereinafter “*Canada Assistance Plan Reference*”].

of its spending power. But supervision of the spending power is not a separate head of judicial review. If a statute is neither *ultra vires* nor contrary to the *Canadian Charter of Rights and Freedoms*, the courts have no jurisdiction to supervise the exercise of legislative power.³⁵

Under this view, which is largely informed by the principle of parliamentary supremacy, the normative consequences of federalism begin and stop with the formal division of powers, and any reflection on these consequences should take place only where questions of constitutional *validity* are raised.³⁶ This highly positivistic position is reminiscent of that adopted by the majority on the legal question in the *Patriation Reference*, notably in its reductionist approach to the supervisory role of the judiciary regarding the practice of federalism. Unless questions of validity are formally raised, the resolution of disputes regarding that practice is left to the political process. Justice Sopinka's approach in the *Canada Assistance Plan Reference* is even closer to that of the three dissenters on the conventional issue in the *Patriation Reference*, for whom no judicially cognizable norm, be it characterized as legal or conventional in nature, can ever impede that process. To say the least, this judicial "hands-off" approach seems to entrust the political process with many virtues that may not always manifest themselves in the daily life of federations. It is as if a judicial intervention would necessarily, and negatively, disturb the putative harmony of this idealized political process. Perhaps more significantly, however, it is as if concerns for federalism were somehow less important than other concerns with an equivalent constitutional status. For example, no effort whatsoever is made to seriously address the possibility of a reconceptualization of the principle of parliamentary supremacy and of the doctrine of legitimate expectations in light of the federal structure of Canada.

In other cases, however, arguments grounded on the principle of federalism were accepted either by the whole Court, by a majority of the Court, or in dissent.

Such was the case in *R. v. S. (S.)*,³⁷ where the principle of federalism was relied upon to counter an argument based on *Canadian Charter of*

³⁵ *Id.*, at 567.

³⁶ Interestingly, a distinction here seems to be made between conflicts of jurisdictions and conflicts of interests, in the sense that while provincial *interests* may have been severely affected in the *Canada Assistance Plan Reference*, *id.*, the provinces' constitutional *jurisdictions* were not, strictly speaking.

³⁷ [1990] S.C.J. No. 66, [1990] 2 S.C.R. 254 (S.C.C.).

*Rights and Freedoms*³⁸ equality rights that sought to persuade the Court that the *Young Offenders Act*,³⁹ which allowed provinces to set up rehabilitation programs, discriminated against residents of provinces that had refused to do so. The Supreme Court invoked federalism as a justification for legitimizing, as respectful of the diversity inherent to a federation, a federal statute which allowed for the expression of diverse public policies reflecting different provincial sensibilities. The Court added that federalism does not require uniformity, and that section 15 of the Charter could not be used to challenge a differential treatment based on the province of residence merely because it is different. In another case involving the Charter rather than the federal division of powers, the Court followed a similar logic when it upheld the constitutionality of a Quebec statute restricting freedom of association, notably in light of the province’s particular history of labour relations.⁴⁰ The federal principle was characterized as allowing for the expression of common values susceptible to being implemented differently depending on the province involved and its particular context.

The legal situation examined in the last two cases only incidentally raised questions pertaining to federalism. In contrast, these questions were front and centre in a 1993 case where the Supreme Court again had to tackle the problem of federal unilateralism, albeit in a context quite different from those of the *Patriation Reference* or of the *Canada Assistance Plan Reference*.

In the *Ontario Hydro* case,⁴¹ the Court had to address the scope of Parliament’s unilateral and discretionary power to declare works for the general advantage of Canada.⁴² Justice Iacobucci, with whom three judges concurred on the legitimacy of relying on the federal principle for interpretive purposes in the case at bar,⁴³ expressed the following view, relying on the *Patriation Reference* as to the relevance of the federal principle in that case:

³⁸ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11 [hereinafter “Charter”].

³⁹ S.C. 1980-81-82-83, c. 110.

⁴⁰ *R. v. Advance Cutting & Coring Ltd.*, [2001] S.C.J. No. 68, [2001] 3 S.C.R. 209 (S.C.C.).

⁴¹ *Ontario Hydro v. Ontario (Labour Relations Board)*, [1993] S.C.J. No. 99, [1993] 3 S.C.R. 327 (S.C.C.) [hereinafter “*Ontario Hydro*”].

⁴² Such a declaration has the effect of unilaterally transferring under federal jurisdiction the work which was initially under provincial jurisdiction.

⁴³ *Supra*, note 41. Justices Cory and Sopinka co-signed Iacobucci J.’s opinion, while Lamer C.J.C. agreed with him in a separate opinion as far as the principles were concerned.

The federal principle cannot be reconciled with a state of affairs where the modification of provincial legislative powers could be obtained by the unilateral action of the federal authorities. ... While the use of the declaratory power is not as dramatic as the unilateral amending of the Constitution, in my view the federal principle should be respected nonetheless. Parliament's jurisdiction over a declared work must be limited so as to respect the powers of the provincial legislatures but consistent with the appropriate recognition of the federal interests involved.⁴⁴

However, La Forest J., writing for himself and two other judges, rebutted his colleague's claim that courts should narrowly construe the declaratory power because of the dangers it posed to Canada's federal structure:

It was argued that the declaratory power must be read narrowly to make it conform to principles of federalism. There is no doubt that the declaratory power is an unusual one that fits uncomfortably in an ideal conceptual view of federalism. But the Constitution must be read as it is, and not in accordance with abstract notions of theorists. It expressly provides for the transfer of provincial powers to the federal Parliament over certain works.

.....

The restricted view advanced here for the first time appears to be based on the danger thought to be posed to the structure of Canadian federalism if the courts do not confine federal power in this area. ... *But more fundamentally I think the argument evinces a misunderstanding of the respective roles of law and politics in the specifically Canadian form of federalism established by the Constitution.* ...

It is the very breadth of these powers that protects against their frequent or inappropriate use. It was not the courts but political forces that dictated their near demise. They are, as was said of the power of disallowance, "delicate" and "difficult" powers to exercise and "will always be considered a harsh exercise of power, unless in cases of great and manifest necessity ..." ... Their inappropriate use will always raise grave political issues, issues that the provincial authorities and the citizenry would be quick to raise. *In a word, protection against abuse of these*

⁴⁴ *Id.*, at 404.

*draconian powers is left to the inchoate but very real and effective political forces that undergird federalism.*⁴⁵

Justice La Forest went on to say that he could not see in the *Patriation Reference* anything that contradicted this last assertion:

I see nothing in the statement in *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753, to the effect that a substantial measure of provincial consent was required before the Constitution could be amended that is in any way at odds with this. *For the Court in that case made it clear that it was not within its province to enforce this requirement. It was, it noted, a convention. The enforcement of conventions lies in the political, not the legal field.* They can be broken, and the courts have no power to prevent this, but there is a political price to pay. The courts have not engaged in the task of defining the manner in which these broad political bases of Canadian federalism should be protected. The Constitution has not accorded them that mandate. These are matters for the people. *This is not to say that the courts do not have an important, indeed essential, role in balancing federalism as they go about their task of defining the nature and effect of those great but more subtle powers, not susceptible of definition and direction by those elemental political forces that undergird Canadian federalism.*⁴⁶

This excerpt of La Forest J.’s opinion reveals that while he supports a reference to the principle of federalism, he seems reluctant to use it as a normative standard that could serve as an *intrinsic* limit to the heads of power explicitly allocated in the *Constitution Act, 1867*.⁴⁷ It is worth noting in this respect that he proved less reluctant to rely on it as an *extrinsic* limit in his application of the national concern branch of Parliament’s power to legislate for the peace, order and good government to the particular *facts* of the *Crown Zellerbach* case.⁴⁸ Dissenting in this case, he expressed the view that attributing to Parliament exclusive jurisdiction over environmental pollution would sacrifice the principles of federalism enshrined in the Constitution. Justice La Forest seemed to

⁴⁵ *Id.*, at 370-72 (emphasis added).

⁴⁶ *Id.* (emphasis added).

⁴⁷ This somehow echoes his majority opinion in *R. v. Hydro-Québec*, [1997] S.C.J. No. 76, [1997] 3 S.C.R. 213 (S.C.C.), where he again seemed reluctant to rely on a generic conception of federalism and emphasized the need to understand this principle as it is reflected within the Canadian federal context.

⁴⁸ *R. v. Crown Zellerbach Canada Ltd.*, [1988] S.C.J. No. 23, [1988] 1 S.C.R. 401, at paras. 69-71 (S.C.C.) [hereinafter “*Crown Zellerbach*”].

opine that the federal principle implies a requirement of proportionality and balance, both in the actions of governments and in the outcomes that courts reach when interpreting the division of powers in light of a claim with potentially drastic ramifications.

In *Crown Zellerbach*, La Forest J. uses federalism as an interpretive principle. In *Ontario Hydro*, he clearly manifests a reluctance to further expand its reach and to grant it a full-fledged legal status. Yet, despite the learned judge's concerns, it remains that a majority of judges in the latter case were inclined to give it such a status, thereby transforming it from a mere principle of political morality to a legal principle limiting the ways in which an undisputed constitutional power can be exercised. Under that view, the principle of federalism is envisaged as an interpretive legal principle.

The next case where the principle of federalism played a significant role is the famous *Quebec Secession Reference*,⁴⁹ which provides a watershed moment as far as the legal status of that principle is concerned. To be first noted in this advisory opinion is the fact that a unanimous Supreme Court reiterates the definition of the "Constitution" that was adopted by the majority on the conventional question in the *Patriation Reference*.⁵⁰ The Court then uses the principle of federalism as one of the four principles forming a super-structural analytical framework for the question of secession. It observes, unsurprisingly, that federalism is a means to reconcile unity with diversity,⁵¹ as it grants federated units a sphere of autonomy that allows them to develop their societies.⁵² Federalism also institutionalizes different levels of political communities, all legitimized to make decisions in their respective areas of jurisdiction.⁵³ As far as the particular question of Quebec is concerned, the Court seems eager to reinforce its legitimacy in the province after the *Patriation Reference* and the *Quebec Veto Reference*, by explaining the creation of the Canadian federation and its institutions by and large as a response to Quebec's social and demographic distinctiveness within Canada.⁵⁴ Most interesting, however, is the fact that the Supreme Court

⁴⁹ *Reference re Secession of Quebec*, [1998] S.C.J. No. 61, [1998] 2 S.C.R. 217 (S.C.C.) [hereinafter "*Quebec Secession Reference*"].

⁵⁰ *Id.*, at para. 32, citing the *Patriation Reference*, *supra*, note 2.

⁵¹ *Id.*, at para. 43.

⁵² *Id.*, at para. 58.

⁵³ *Id.*, at para. 66.

⁵⁴ *Id.*, at para. 59.

recognizes in the *Secession Reference* that the principles upon which it bases its analysis, including the federal principle, are normative and may in some circumstances give rise to general or specific substantive legal obligations and thus limit government action.⁵⁵ Although it insists that the written text of the Constitution shall prevail over such principles,⁵⁶ the text of many constitutional provisions remains rather vague or subject to different interpretations, thereby creating an opening for the use of these principles.⁵⁷ Even though the Court remains ambiguous on which principle can be judicially enforced, and in which circumstances,⁵⁸ the fact remains that the *Secession Reference* clarifies the legal status of the principle of federalism and its primarily interpretive function. It shies away, though, from treating it as a free-standing principle that would alone give rise to obligations and impose duties on governmental actors.⁵⁹

The language used in the *Secession Reference* about the principle of federalism is broadly reminiscent of that used in the majority opinion on the conventional question in the *Patriation Reference*. One question that it raises, however, and that remains unanswered to this day, is to what extent constitutional conventions based on the principle of federalism and recognizable under the *Patriation Reference*'s analytical grid could now be vested with a formal legal, rather than merely political, status in the post-*Secession Reference* world. This further raises the question of the judiciary's role in the recognition of breaches of such a principle. Could, for instance, the logic underlying the judicial recognition of conventions as expounded in the *Patriation Reference* be extended to the principle of federalism? More precisely, could a governmental actor ask a court of law for a declaratory judgment that the principle of federalism has been disrespected as a result of the actions of another governmental actor, even when no formal division of powers argument is made? This would again raise the question of the possibility of treating the principle

⁵⁵ *Id.*, at para. 54.

⁵⁶ *Id.*, at para. 53.

⁵⁷ J.-F. Gaudreault-DesBiens, “The Quebec Secession Reference and the Judicial Arbitration of Conflicting Narratives About Law, Democracy and Identity” (1999) 24 Vermont L. Rev. 792, at 825-26 [hereinafter “Gaudreault-DesBiens, ‘Quebec Secession Reference’”].

⁵⁸ For this type of analysis, see generally J. Leclair, “Canada's Unfathomable Unwritten Constitutional Principles” (2001-2002) 14 Queen's L.J. 389.

⁵⁹ This is also the view that was adopted about another principle, that of the protection of minorities, in *Baie d'Urfé (Ville) v. Québec (Procureur général)*, [2001] J.Q. no 4821, [2001] R.J.Q. 2520 (Que. C.A.), leave to appeal refused, [2001] C.S.C.R. no 524 (S.C.C.).

of federalism as a free-standing legal principle, but with a limited enforceability potential when treated as such.

That being said, post-*Secession Reference* cases have not dealt with these questions and have tended instead to treat the federal principle as an interpretive tool justifying distinctions between a merely *legitimate* interpretation of the division of powers and a *better* one. As such, it has almost become a conflict rule between two possible interpretations. That is how it was used, *inter alia*, in the *Canadian Western Bank* case,⁶⁰ where the majority opinion held, relying on that principle, that the interpretation of the division of powers should facilitate the legitimate interaction of both levels of government and support cooperative federalism. It also advocated a narrow interpretation of the doctrine of jurisdictional exclusiveness, arguing that the historical asymmetry of its application threatened subsidiarity, which was envisaged as consubstantial to federalism.⁶¹

The principle of federalism was also relied upon in very recent cases, where its interpretive status was not really challenged: *Assisted Human Reproduction Act Reference*⁶² and *Lacombe*.⁶³ What is striking in these cases, however, is the extent to which deep disagreements emerged within the Supreme Court regarding the normative consequences to be drawn from the otherwise innocuous and amorphous principle of federalism.

IV. THE ABSENCE OF ANY STRONG CONSENSUS ON THE NORMATIVE CONSEQUENCES OF THE PRINCIPLE OF FEDERALISM

The post-*Patriation Reference* case law invoking the principle of federalism reveals the existence of some interpretive consensuses within the Supreme Court of Canada. However, they all stand at a very high level of generality, bordering on triteness.

⁶⁰ *Canadian Western Bank v. Alberta*, [2007] S.C.J. No. 22, [2007] 2 S.C.R. 3 (S.C.C.) [hereinafter “*Canadian Western Bank*”]; see also *British Columbia (Attorney General) v. Lafarge Canada Inc.*, [2007] S.C.J. No. 23, [2007] 2 S.C.R. 86 (S.C.C.).

⁶¹ *Canadian Western Bank, id.*, at para. 45. See also *Quebec (Attorney General) v. Canadian Owners and Pilots Assn.*, [2010] S.C.J. No. 39, [2010] 2 S.C.R. 536, at para. 44 (S.C.C.), *per* Deschamps J.

⁶² *Reference re Assisted Human Reproduction Act*, [2010] S.C.J. No. 61, [2010] 3 S.C.R. 457 (S.C.C.).

⁶³ *Quebec (Attorney General) v. Lacombe*, [2010] S.C.J. No. 38, [2010] 2 S.C.R. 453 (S.C.C.) [hereinafter “*Lacombe*”].

The most important and recurrent one is that federalism should be understood, to the extent possible, as implying that both levels of government, whenever they can reasonably claim jurisdiction over one aspect or another of a matter, should enjoy as much legislative space as possible. This has primarily been done through an expansive application of the double aspect doctrine,⁶⁴ at the expense of a strict application of the doctrine of jurisdictional exclusiveness.⁶⁵ This interpretive trend is somewhat antecedent to the early 1980s references, but it has been reinforced since, notably through the promotion in recent cases of a more restrictive interpretation of the doctrine of interjurisdictional immunity. This narrow interpretation seeks to prevent the creation of jurisdictional “enclaves”. As well, the confirmation of this doctrine’s possible application to provincial areas of jurisdiction has theoretically restored some balance or symmetry between the federated and federal levels of government.⁶⁶ However, the real normative strength⁶⁷ of this revamped interpretation of interjurisdictional immunity remains questionable in light of the fact that two recent cases of 2010 blatantly contradict it. At the very least, they evince the resilience of an “exclusivist” conception of federalism as solely benefitting the federal government.⁶⁸

In spite of that, the Supreme Court’s overwhelming preference for an “overlapping” conception of federalism can hardly be challenged. To the extent that such a conception is not used to mask a quiet and unprincipled

⁶⁴ See *Alberta Government Telephones v. Canada (Canadian Radio-television and Telecommunications Commission)*, [1989] S.C.J. No. 84, [1989] 2 S.C.R. 225 (S.C.C.); *Mitchell v. Peguis Indian Band*, [1990] S.C.J. No. 63, [1990] 2 S.C.R. 85 (S.C.C.); *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] S.C.J. No. 1, [1992] 1 S.C.R. 3 (S.C.C.); *R. v. Hydro-Québec*, [1997] S.C.J. No. 76, [1997] 3 S.C.R. 213 (S.C.C.); *Chatterjee v. Ontario (Attorney General)*, [2009] S.C.J. No. 19, [2009] 1 S.C.R. 624 (S.C.C.); *NIL/TU, O Child and Family Services Society v. B.C. Government and Service Employees’ Union*, [2010] S.C.J. No. 45, [2010] 2 S.C.R. 696 (S.C.C.) [hereinafter “*NIL/TU, O*”].

⁶⁵ This trend, which has been prevalent for at least 30 years or so, has been well documented by B. Ryder in “The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and First Nations” (1991) 36 McGill L.J. 309 and “The End of Umpire? Federalism and Judicial Restraint” in J. Cameron, P. Monahan & B. Ryder, eds. (2006) 34 S.C.L.R. (2d) 345.

⁶⁶ See the majority opinions in *Canadian Western Bank*, *supra*, note 60, esp. at para. 45; *British Columbia (Attorney General) v. Lafarge Canada Inc.*, *supra*, note 60; *Chatterjee v. Ontario (Attorney General)*, *supra*, note 64; *Consolidated Fastfrate Inc. v. Western Canada Council of Teamsters*, [2009] S.C.J. No. 53, [2009] 3 S.C.R. 407 (S.C.C.).

⁶⁷ On the concept of “normative strength”, see generally Catherine Thibierge *et al.*, eds., *La force normative. Naissance d’un concept* (Paris & Brussels: L.G.D.J. & Bruylant, 2009).

⁶⁸ See Deschamps J.’s opinion in *Lacombe*, *supra*, note 63, at paras. 110 and 184-186. See also *Quebec (Attorney General) v. Canadian Owners and Pilots Assn.*, *supra*, note 61.

take-over of the jurisdictions allocated to one level of government by the other, it arguably better fits with the spirit of federalism,⁶⁹ which emphasizes the autonomy of both federal and federated levels of government while taking stock of the constitutional need to prevent the subordination of one by the other, and which acknowledges that a federation is more than a collection of loosely linked autonomous entities: it is in itself an overarching legal order, albeit an internally plural one.

Yet, this overlapping conception of federalism merely refers to a broad attitude towards the interpretation of the division of powers, and does not say much about the normative consequences of the principle of federalism. The same can be said about the link between federalism and cooperation. Indeed, the Supreme Court has suggested in some cases that cooperation is not only inherent to federalism pragmatically understood, but that it is to be encouraged and valued.

In *Fédération des producteurs de volailles du Québec v. Pelland*, the Court had to examine the constitutional validity of a federal-provincial chicken marketing scheme which permitted a federal body to delegate its authority to regulate the marketing of chickens, both inter-provincially and extra-provincially, to a provincial body. The Supreme Court dismissed the challenge to the constitutionality of this delegation mechanism, noting that the federal-provincial agreement at stake “both reflects and reifies Canadian federalism’s constitutional creativity and cooperative flexibility”.⁷⁰ Jurisdictional entanglement being the logical offspring of an overlapping conception of federalism, it renders cooperation necessary, and a “benevolent” form of constitutional scrutiny must thus be applied.

The same benevolent approach is observable in the 2010 case of *NIL/TU,O*,⁷¹ where the Court was asked to determine whether the labour relations in an agency delivering services to Aboriginal families and children fell under federal jurisdiction over “Indians”, even if such services are normally presumed to be under provincial jurisdiction. In the case at bar, a tripartite joint decision scheme had been set up. Justice

⁶⁹ For similar types of arguments, see D. Weinstock, “Liberty and Overlapping Federalism” in S. Choudhry, J.-F. Gaudreault-DesBiens & L. Sossin, eds., *Dilemmas of Solidarity: Redistribution in the Canadian Federation* (Toronto: University of Toronto Press, 2006), at 167; Robert A. Shapiro, *Polyphonic Federalism: Toward the Protection of Fundamental Rights* (Chicago: University of Chicago Law Press, 2009).

⁷⁰ *Fédération des producteurs de volailles du Québec v. Pelland*, [2005] S.C.J. No. 19, [2005] 1 S.C.R. 292, at para. 15 (S.C.C.).

⁷¹ *Supra*, note 64.

Abella, speaking for a group of six justices forming a majority as to the reasoning (the outcome was unanimous), summarizes the working of that scheme as follows:

NIL/TU,O’s operational features are painted with the same co-operative brush. The agency exists because of a sophisticated and collaborative effort by the Collective First Nations, the government of British Columbia and the federal government to respond to the particular needs of the Collective First Nations’ children and families. This effort has resulted in a detailed and integrated operational matrix comprised of NIL/TU,O’s Constitution and by-laws, a tripartite delegation agreement, an intergovernmental memorandum of understanding, a set of Aboriginal practice standards, a federal funding directive and provincial legislation, all of which govern the provision of child welfare services by NIL/TU,O in a manner that respects and protects the Collective First Nations’ traditional values.

By virtue of the memorandum of understanding and the tripartite agreement, the federal government actively endorsed the province’s oversight of the delivery of child welfare services to Aboriginal children in the province, including those services provided by NIL/TU,O to the Collective First Nations. I see this neither as an abdication of regulatory responsibility by the federal government nor an inappropriate usurpation by the provincial one. It is, instead, an example of flexible and co-operative federalism at work and at its best.⁷²

These general observations helped her conclude that:

The essential nature of NIL/TU,O’s operation is to provide child and family services, a matter within the provincial sphere. Neither the presence of federal funding, nor the fact that NIL/TU,O’s services are provided in a culturally sensitive manner, in my respectful view, displaces the overridingly provincial nature of this entity. The community for whom NIL/TU,O operates as a child welfare agency does not change *what* it does, namely, deliver child welfare services. The designated beneficiaries may and undoubtedly should affect how those services are delivered, but they do not change the fact that the delivery of child welfare services, a provincial undertaking, is what it essentially does.⁷³

⁷² *Id.*, at paras. 43-44.

⁷³ *Id.*, at para. 45.

While advocating a more robust application of the relevant functional test in view of better protecting core federal jurisdictions from provincial encroachments, McLachlin C.J.C., and Binnie and Fish JJ., did not distance themselves from Abella J.'s remarks concerning cooperation.

Yet, a benevolent form of constitutional scrutiny in contexts evincing intergovernmental cooperation does not mean that generic considerations pertaining to cooperative federalism trump the application of the federal division of powers. In *Canada (Attorney General) v. PHS Community Services Society*,⁷⁴ the Supreme Court had to examine the constitutional validity of some provisions of the federal *Controlled Drugs and Substances Act*⁷⁵ which, according to some parties to the dispute, unconstitutionally applied to provincial health facilities. Although the case was ultimately decided against the federal government on the basis of the *Canadian Charter of Rights and Freedoms*, the Court upheld the impugned provisions from the standpoint of the division of powers. In so doing, it unanimously reiterated the primacy of an overlapping conception of federalism⁷⁶ and the restrictive scope to be given to the doctrine of interjurisdictional immunity,⁷⁷ noting that this doctrine created a tension “with the emergent practice of cooperative federalism, which increasingly features interlocking federal and provincial legislative schemes”.⁷⁸ Interestingly, Insite, the safe injection facility that was bound to close as a result of the federal government's withdrawal of an exemption granted under the *Controlled Drugs and Substances Act*, was characterized by the Court as a product of cooperative federalism,⁷⁹ since the competent levels of governments had originally decided to exercise their respective jurisdictions in a way that was conducive to the creation and operation of the facility. However, the court's rejection of Insite's federalism-based challenge of the withdrawal of the exemption sends a rather clear message as to the normative reach of the principle of cooperation, if any: the mere fact that a policy, a program or an institution owes its existence to the practice of cooperative federalism does not shield it from the strict application of the federal division of powers. In this way, the Supreme Court effectively precludes the Canadian version

⁷⁴ [2011] S.C.J. No. 44, 2011 SCC 44 (S.C.C.) [hereinafter “*PHS Community Services*”].

⁷⁵ S.C. 1996, c. 19.

⁷⁶ *PHS Community Services*, *supra*, note 74, at para. 62.

⁷⁷ *Id.*, at para. 61.

⁷⁸ *Id.*, at para. 63.

⁷⁹ *Id.*, at para. 19.

of cooperative federalism from creating the “joint-decision traps” that have plagued more strongly integrated and interlocked federations, such as Germany.⁸⁰

That being said, an overlapping conception of federalism inevitably presupposes a shift from a radically competitive understanding of federalism, which often translates into strong claims of jurisdictional exclusiveness over narrowly defined subject matters, to a more cooperative vision of federalism encouraging a shallower definition of these subject matters. However, it is one thing to say that such a vision now permeates the Supreme Court’s rhetoric; it is quite another to say that cooperation has been elevated to the status of a normative standard that would allegedly flow from the principle of federalism. Indeed, as seen earlier, the *Canada Assistance Plan Reference*⁸¹ seems to indicate the exact opposite. In this case, the principle of parliamentary supremacy easily superseded any other potential federalism-inspired claim supporting a formal legal obligation to cooperate or to take into consideration the other level of government’s interests, as opposed to jurisdictions, when legislating.

It thus becomes overwhelmingly clear that the practical, political need for cooperation between federal actors cannot be relied upon to displace formal jurisdictional allocations or otherwise constitutionally recognized constitutional principles with a well-defined normative content. At best it can be argued that the Supreme Court implicitly accepts the existence of a rebuttable presumption of reasonable cooperation between the federal government and the provinces.⁸² We are thus light years away from a formal constitutional duty to cooperate that would be deemed inherent to federalism. This does not mean, however, that cooperation is not constitutionally *valued*, which is markedly different from being compulsory. In this regard, the doctrine of comity

⁸⁰ The term “joint-decision trap” was coined by Fritz W. Scharpf in “The Joint-Decision Trap: Lessons from German Federalism and European Integration” (1988) 66 Public Administration 239.

⁸¹ *Supra*, note 34.

⁸² The roots of such a presumption can be traced back to the old Privy Council case of *Montreal (City) v. Montreal Street Railway*, [1912] J.C.J. No. 1, [1912] A.C. 333 (J.C.P.C.). I elaborate on this in J.-F. Gaudreault-DesBiens, “The Ethos of Canadian Aboriginal Law and the Potential Relevance of Federal Loyalty in a Reconfigured Relationship between Aboriginal and Non-Aboriginal Governments: A Thought Experiment”, in G. Otis & M. Papillon, eds., *The Relational Dimension of Indigenous Governance and Federalism: Theories and Practices* (Ottawa: University of Ottawa Press, forthcoming 2012).

can be construed as imposing upon provinces' occasional obligations to cooperate, be it by refraining from interfering into another province's affairs ("passive cooperation"), or by recognizing rulings emanating from another province ("active cooperation"). The doctrine of comity originates in customary international law, where it refers to obligations imposed upon states to respect differences between their own legal system and a foreign state's legal system to which they turn for judicial assistance, failure by the former to respect these differences being characterized as a potential threat to the latter's sovereignty. It has been transplanted into federal settings, because relationships between the various governments of a federation also raise interjurisdictional problems. There is no formal provision of the *Constitution Act, 1867* enshrining comity-related obligations,⁸³ but judicial interpretation, especially in cases dealing with the extra-territorial effects of provincial legislation, has made clear that the doctrine plays a key role in ensuring the orderly functioning of the federation.⁸⁴ In *Morguard Investments Ltd. v. De Savoye*, LaForest J., speaking for the entire Supreme Court, stated that:

... there is really no comparison between the interprovincial relationships of today and those obtaining between foreign countries in the 19th century. Indeed, in my view, there never was and the courts made a serious error in transposing the rules developed for the enforcement of foreign judgments to the enforcement of judgments from sister-provinces. The considerations underlying the rules of comity apply with much greater force between the units of a federal state, and I do not think it much matters whether one calls these rules of comity or simply relies directly on the reasons of justice, necessity and convenience to which I have already adverted.⁸⁵

The Supreme Court further mentioned that the extra-territorial application of an otherwise valid provincial legislation must be conditioned by "the requirements of order and fairness that underlie our federal

⁸³ Except, perhaps, s. 121 which, by prohibiting provinces from imposing duties and tariffs, could arguably be read as iterating a form of comity-related negative obligation.

⁸⁴ *Morguard Investments Ltd. v. De Savoye*, [1990] S.C.J. No. 135, [1990] 3 S.C.R. 1077 (S.C.C.); *Hunt v. T&N plc*, [1993] S.C.J. No. 125, [1993] 4 S.C.R. 289 (S.C.C.); *Tolofson v. Jensen*; *Lucas (Litigation Guardian of) v. Gagnon*, [1994] S.C.J. No. 110, [1994] 3 S.C.R. 1022 (S.C.C.). See H. Patrick Glenn, "Reconciling Regimes: Legal Relations of States and Provinces in North America" (1998) 15 *Ariz. J. Int'l & Comp. Law* 255.

⁸⁵ *Morguard Investments Ltd.*, *id.*, at 1098.

arrangements”.⁸⁶ In other words, the application of such legislation should not unduly interfere with the interests of the province where the extra-territorial effects will materialize.

Although the doctrine of comity as it applies between provinces has been granted full-fledged constitutional status,⁸⁷ its normative potential appears somewhat limited as far as imposing more systematic and onerous cooperative duties upon Canadian federal actors is concerned. Indeed, it is difficult to fathom how it could be expanded and strengthened outside of the circumstances generally giving rise to its application. Thus, apart from exceptional circumstances, cooperation in the Canadian federation is to be legally understood as imposing, at best, obligations of means rather than obligations of results. This view seems comforted by the Supreme Court’s anticipatory refusal to ever monitor the discharge of the duty to negotiate identified in the *Quebec Secession Reference*,⁸⁸ whose potential to outgrow the admittedly exceptional context in which it was found to exist, except perhaps when a formal constitutional amendment is contemplated, appears limited.

Another generic normative consequence derived from the principle of federalism appears to be that of proportionality, which is itself linked to a vision of the federation as both reflecting and embodying a specific type of political equilibrium worth preserving. The observations made in Binnie and LeBel JJ.’s majority opinion in *Canadian Western Bank v. Alberta*⁸⁹ regarding the sometimes problematic reach of the doctrine of interjurisdictional immunity evidence the Court’s commitment to the overarching importance of proportionality as a regulatory principle informing the interpretation of the federal division of powers:

Further, a broad use of the doctrine of interjurisdictional immunity runs the risk of creating an unintentional centralizing tendency in constitutional interpretation. As stated, this doctrine has in the past most often protected federal heads of power from incidental intrusion by provincial legislatures. The “asymmetrical” application of interjurisdictional immunity is incompatible with the flexibility and co-ordination required by contemporary Canadian federalism. Commentators have noted that an

⁸⁶ *Unifund Assurance Co. v. Insurance Corp. of British Columbia*, [2003] S.C.J. No. 39, [2003] 2 S.C.R. 63, at para. 56 (S.C.C.).

⁸⁷ *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, [2004] S.C.J. No. 44, [2004] 2 S.C.R. 427, at para. 55 (S.C.C.).

⁸⁸ *Supra*, note 49, at paras. 88-90.

⁸⁹ *Supra*, note 60.

extensive application of this doctrine to protect federal heads of power and undertakings is both unnecessary and “undesirable in a federation where so many laws for the protection of workers, consumers and the environment (for example) are enacted and enforced at the provincial level” The asymmetrical effect of interjurisdictional immunity can also be seen as undermining the principles of subsidiarity, i.e. that decisions “are often best [made] at a level of government that is not only effective, but also closest to the citizens affected” (114957 *Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, [2001] 2 S.C.R. 241, 2001 SCC 40, at para. 3).⁹⁰

More recently, the majority opinion in *Reference re Assisted Human Reproduction Act*⁹¹ evinces similar concerns about “[t]he need to maintain the balance resulting from the division of legislative powers provided for in the *Constitution Act, 1867*.”⁹²

The requirement that the actions of one level of government must not unduly encroach on another level’s areas of jurisdiction is obviously not specific to post-1980 federalism cases. However, a broader concern about proportionality has arguably been expressed since the late 1970s and early 1980s through various tests that seek, albeit imperfectly, to prevent outcomes upsetting the balance of federalism. The first that springs to mind is the one applicable where the national dimensions branch of the federal power to legislate for the peace, order and good government is invoked,⁹³ which has indeed contributed, despite assertions to the contrary,⁹⁴ to making more difficult the resort to the national dimensions doctrine.⁹⁵ A second test that to a lesser extent reflects a concern for maintaining the federation’s equilibrium is the one applicable to federal claims grounded on the general power to legislate over trade and commerce.⁹⁶

⁹⁰ *Id.*, at para. 45.

⁹¹ *Supra*, note 62.

⁹² *Id.*, at para. 193. See also para. 246.

⁹³ *Crown Zellerbach*, *supra*, note 48. See also Beetz J.’s opinion in *Re Anti-Inflation Act (Canada)*, [1976] S.C.J. No. 12, [1976] 2 S.C.R. 373 (S.C.C.).

⁹⁴ For example, Professors Brun, Tremblay and Brouillet argue in *Droit constitutionnel*, 5th ed. (Cowansville, QC: Éditions Yvon Blais, 2008), at 434, that rulings such as *Crown Zellerbach* have contributed to transforming Canada into a quasi-federation the existence of which is maintained simply as a result of a “tolerant attitude” of the federal government towards provinces.

⁹⁵ *R. v. Hydro-Québec*, *supra*, note 47.

⁹⁶ *General Motors of Canada Ltd. v. City National Leasing Ltd.*, [1989] S.C.J. No. 28, [1989] 1 S.C.R. 641 (S.C.C.) [hereinafter “GMC”].

That being said, even if one considers proportionality to broadly inspire the adjudication of division of powers cases, the particular normative consequences flowing from this principle remain difficult to fathom, absent further reference to a specific doctrine of interpretation of that division of powers. Moreover, one may legitimately wonder to what extent this broad concern for proportionality is peculiar to federalism. Indeed, concerns for proportionality infuse so many areas of the law that a scholar such as David Beatty has even argued that this principle represents the “ultimate rule of law”.⁹⁷ Yet, there are other ways to address, in a more indirect way, questions pertaining to proportionality. An increasingly important one lies in a reference to subsidiarity, which in the Supreme Court’s own recent discourse, seems to be emerging as a principle consubstantial to federalism.

It must first be noted that the main ideas underlying subsidiarity were already incorporated in the Canadian law of federalism long before the word “subsidiarity” was ever printed in a volume of the Supreme Court reports.⁹⁸ Indeed, explicit references to provincial inability in cases dealing with Parliament’s powers to legislate for the peace, order, and good government of Canada in view of addressing national concerns,⁹⁹ or to legislate under the trade and commerce power for equivalent purposes,¹⁰⁰ reflect the main ideas underlying subsidiarity. The *Quebec Secession Reference*’s vision of the federal structure as “distributing power to the government thought to be the most suited to achieving the particular societal objective having regard to this diversity”¹⁰¹ also incorporates assumptions traditionally associated with subsidiarity.

Second, since the word “subsidiarity” made its first official appearance in the Supreme Court’s case law in *114957 Canada Ltée (Spraytech, Société d’arrosage) v. Hudson (Town)*,¹⁰² a number of important cases

⁹⁷ David Beatty, *The Ultimate Rule of Law* (Oxford: Oxford University Press, 2004).

⁹⁸ P.W. Hogg, “Subsidiarity and the Division of Powers in Canada” (1993) 3 N.J.C.L. 341; R. Howse, “Subsidiarity in All but Name: Evolving Concepts of Federalism in Canadian Constitutional Law” [hereinafter “Howse”] in H.P. Glenn, ed., *Contemporary Law: Canadian Reports to the 1994 Congress of Comparative Law* (Cowansville: Éditions Yvon Blais 1995), at 701.

⁹⁹ *Crown Zellerbach*, *supra*, note 48.

¹⁰⁰ *GMC*, *supra*, note 96.

¹⁰¹ *Quebec Secession Reference*, *supra*, note 49, at para. 58.

¹⁰² [2001] S.C.J. No. 42, [2001] 2 S.C.R. 241 (S.C.C.) [hereinafter “*Hudson*”]. In this case, L’Heureux-Dubé J. defined the principle of subsidiarity as “the proposition that law-making and implementation are often best achieved at a level of government that is not only effective, but also closest to the citizens affected and thus most responsive to their needs, to local distinctiveness, and to population diversity” (at para. 3).

have evoked this principle.¹⁰³ Most notably, it appears prominently in *Canadian Western Bank*, where the majority opinion holds, quoting *Hudson*, that “[t]he asymmetrical effect of interjurisdictional immunity can also be seen as undermining the principles of subsidiarity, i.e. that decisions ‘are often best [made] at a level of government that is not only effective, but also closest to the citizens affected’.”¹⁰⁴

The exact juridical status of subsidiarity remains somewhat ambiguous, though. Indeed, in *Quebec (Attorney General) v. Lacombe*, where the Supreme Court had to determine whether a municipality could adopt a by-law prohibiting aerodromes on its territory, the majority, holding that the said by-law encroached upon Parliament’s jurisdiction over aeronautics, superbly ignored the subsidiarity-based argument made in dissent by Deschamps J. The majority opinion in *Lacombe* was drafted by McLachlin C.J.C. on behalf of herself, Binnie, Fish, Abella, Charron, Rothstein and Cromwell JJ. Justice LeBel concurred with the majority as to the outcome of the case, but supported Deschamps J.’s views as to the problem posed by the majority’s use of the doctrine of interjurisdictional immunity in this case. Although he does not mention subsidiarity in his concurring opinion, his approval of Deschamps J.’s views on interjurisdictional immunity, which were inspired by subsidiarity-related concerns, and his own preference for resolving the case by resorting to federal paramountcy (as was by and large advocated in *Canadian Western Bank*), seem to indicate LeBel J.’s intellectual proximity with Deschamps J.’s views on subsidiarity. Interestingly, in *Canadian Western Bank*, where significant emphasis was placed on subsidiarity, the majority opinion was co-signed by McLachlin C.J.C., as well as by Binnie, LeBel, Fish, Abella and Charron JJ. Thus, five judges (excluding LeBel J.) who had found relevant to refer to subsidiarity in *Canadian Western Bank*, ignored it three years later. To say the least, this reveals the state of normative flux in which it seems caught: when should it be relied upon, for what purpose, and, most importantly, what does it mean?¹⁰⁵ No clear

¹⁰³ For an interesting analysis of recent developments concerning subsidiarity, see Dwight Newman, “Changing Division of Powers Doctrine and the Emergent Principle of Subsidiarity” (2011) 74 Sask. L.R. 21 [hereinafter “Newman”].

¹⁰⁴ *Canadian Western Bank*, *supra*, note 60, at para. 45.

¹⁰⁵ This uncertainty is explored by Eugénie Brouillet in “Canadian Federalism and the Principle of Subsidiarity: Should We Open Pandora’s Box?”, in J. Cameron & B. Ryder, eds. (2011) 54 S.C.L.R. (2d) 601.

answer on any of these questions emerges from the post-*Canadian Western Bank* case law.

Just a few months after *Lacombe*, the Supreme Court again split on the question of subsidiarity, but explicitly this time. In *Reference re Assisted Human Reproduction*,¹⁰⁶ a debate arose between two groups of four judges as to what subsidiarity should entail in view of examining the constitutionality of a federal statute regulating assisted reproduction. Justice Cromwell, who was the swing vote in this case, did not specify his views on the impact of subsidiarity. The federal government grounded the constitutionality of that statute on Parliament’s power to enact criminal laws regarding the protection of public health, while the Quebec government contended that some of its most important provisions had the effect of regulating the practice of medicine and were therefore infringing on provincial jurisdiction over hospitals, property and civil rights, and matters of a merely local nature.

On the one hand, LeBel and Deschamps JJ., with whom Abella and Rothstein JJ. concurred, anchored their analysis of the interpretive doctrines of the division of powers within the principle-based framework elaborated on in the *Quebec Secession Reference*, which they interpreted as implicitly recognizing subsidiarity as a sub-principle inherent to that of federalism. After a further examination of the pedigree of that sub-principle in Canadian constitutional law, they considered it to be “an important component of Canadian federalism”,¹⁰⁷ and, referring to *Hudson*, gave it this meaning:

According to this principle, legislative action is to be taken by the government that is closest to the citizen and is thus considered to be in the best position to respond to the citizen’s concerns ...¹⁰⁸

They concluded as follows on the outcome of the case and on the role of the principle of subsidiarity:

In sum, the conclusion that the impugned provisions, far from falling under the federal criminal law power, relate instead to the provinces’ jurisdiction over hospitals, property and civil rights and matters of a merely local or private nature is self-evident. *If any doubt remained, this is where the principle of subsidiarity could apply, not as an independent basis for the distribution of legislative powers, but as an*

¹⁰⁶ *Supra*, note 62.

¹⁰⁷ *Id.*, at para. 183.

¹⁰⁸ *Id.*

*interpretive principle that derives, as this Court has held, from the structure of Canadian federalism and that serves as a basis for connecting provisions with an exclusive legislative power. If subsidiarity were to play a role in the case at bar, it would favour connecting the rules in question with the provinces' jurisdiction over local matters, not with the criminal law power ...*¹⁰⁹

In addition to disagreeing with their colleagues as to the outcome of the case, McLachlin C.J.C., and Binnie, Fish and Charron JJ., adopted a sharply different perspective on the relevance and meaning of subsidiarity. Speaking on their behalf, McLachlin C.J.C. rejected both the idea that subsidiarity could be relied upon to limit the scope of a federal power “to preserve space for provincial regulation”, and the ensuing “connection argument” made by LeBel and Deschamps JJ.¹¹⁰ Particularly interesting is the Chief Justice’s understanding of the subsidiarity principle. She indeed seems to restrict the scope of that principle, as discussed in *Hudson*, to cases where the level of government that is closest to the matter regulated would be allowed, in areas of jurisdictional overlap, “to introduce *complementary* legislation to accommodate local circumstances”.¹¹¹ She concludes that:

[m]ore fundamentally, subsidiarity does not override the division of powers in the *Constitution Act, 1867*. ... Subsidiarity might permit the provinces to introduce legislation that complements the *Assisted Human Reproduction Act*, but it does not preclude Parliament from legislating on the shared subject of health. The criminal law power may be invoked where there is a legitimate public health evil, and the exercise of this power is not restricted by concerns of subsidiarity.¹¹²

Thus, on the one hand, we have a group of four justices led by LeBel and Deschamps JJ. who, in line with the majority opinion in *Canadian Western Bank*, elevate subsidiarity to the status of an interpretive principle of the division of powers in general and of the scope of the jurisdictions therein allocated in particular; on the other hand, we have another group of four justices led by McLachlin C.J.C. who, in spite of *Canadian Western Bank*, seem to understand subsidiarity as applicable only in

¹⁰⁹ *Id.*, at para. 273 (emphasis added). Transparency requires me to disclose that in reaching that conclusion, LeBel and Deschamps JJ. referred to some of my previous work.

¹¹⁰ *Id.*, at para. 69.

¹¹¹ *Id.*, at para. 70 (emphasis added).

¹¹² *Id.*, at para. 72.

cases of jurisdictional overlaps and as merely referring to relations of complementarity between federal and provincial regulatory schemes.

What to make of these conflicting views? Several definitions have been given to the principle of subsidiarity since its foundational modern iteration in the social doctrine of the Roman Catholic Church.¹¹³ Most often, it is understood as referring to “the notion that lower levels of government are inherently better situated to regulate sub-political forms of human association or human relationships”.¹¹⁴ Although generally correct, this definition is somewhat lacking in that it seems to rest on a non-modifiable and univocal value judgment about the respective virtues of lower level and upper level governmental interventions. In my view, a better description of the subsidiarity principle would seek to avoid such univocal judgments and to actualize the meaning of the principle in the context of contemporary federations marked by numerous internal and external challenges. Under this view, subsidiarity would necessarily attempt to reconcile concerns for diversity and for efficiency, and to provide minimal procedural parameters for determining under which circumstances one of these values may trump the other. William Ossipow’s description of the principle neatly captures its main thrust:

The principle of subsidiarity is not univocal in designating the level of decision. It indicates a preferable level (the lowest one possible), which must be defensible from the perspective of the principles of political dignity and autonomy. But it also incorporates a prudential clause which seeks to ensure systemic safety: whenever the theoretically optimal level is unable to accomplish a particular task, it is then up to the other level to take responsibility for this task.¹¹⁵

This highlights the functionalist nature of subsidiarity, which is reflected in one of the principle’s most important recent legal iterations in article 5(2) of the *European Union Treaty*. Although it reiterates a

¹¹³ This was done, first, by Leo XIII (Encyclical Letter, *Rerum Novarum* (Boston: St. Paul ed., 1891)), and then by Pius XI (Encyclical Letter, *Quadragesimo anno* (Boston: St. Paul ed., 1931)).

¹¹⁴ Howse, *supra*, note 98, at 705.

¹¹⁵ W. Ossipow, “Architecture Fédéraliste et Exigence de Justice” (1998) 9 *Philosophie politique* 113, at 127. This is my translation of:

Le principe de subsidiarité n’est pas univoque dans la désignation du niveau de décision. Il indique un niveau souhaitable (le niveau le plus bas possible), défendable en termes du principe de dignité politique et d’autonomie. Mais il incorpore également une clause prudentielle visant à la sécurité systémique: au cas où le niveau théoriquement optimal se révélerait incapable de réaliser une tâche, c’est à un autre niveau de prendre en charge cette tâche.

preference for actions undertaken by the lowest level of government, article 5(2) also confirms that should this level of government be unable to effectively achieve certain predetermined objectives, the higher level of government could legitimately and legally assert jurisdiction in areas of concurrent jurisdiction.¹¹⁶ In the European context, this has led to the recognition that subsidiarity “has both a positive limb (the Union can achieve better results than the regions) and a negative limb (the member states are unable to achieve the objectives of the proposed action).”¹¹⁷ Subsidiarity is thus understood as “a means of determining the appropriate level of action, and is closely related to the concepts of necessity, effectiveness, proportionality, or even good government. It has been promoted as a means of reconciling the conflicting needs of unity and diversity within the EU.”¹¹⁸

There is no need to examine further the particular fate of subsidiarity in the European Union. However, for the purposes of this paper, three observations can be drawn from the above. First, subsidiarity is not an entirely neutral principle; it *does* indicate a preference, which can be defended by resorting to considerations related to democracy, legitimacy and accountability. As Tocqueville noted long ago, administrative centralization runs the risk of reducing among the citizenry what he called “l’esprit de cité” resulting from the proximity (or the impression thereof) of governing bodies.¹¹⁹ This problem, however, can arguably be

¹¹⁶ This article reads as follows:

The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein. In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effect of the proposed action, be better achieved by the Community. Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.

See Treaty Establishing the European Community (February 7, 1992), art. 3b, O.J. (C224) 1, [1992] 1 C.M.L.R. 573. It is to be noted that reference to subsidiarity cannot be made “to question the granting of powers to the Community by the Treaties, but only the exercise of those powers by the passing of particular measures”. See Trevor C. Hartley, ed., *European Union Law in a Global Context: Text, Cases and Materials* (Cambridge: Cambridge University Press, 2004), at 61.

¹¹⁷ N. Karazivan & J.-F. Gaudreault-DesBiens, “On Polyphony and Paradoxes in the Regulation of Securities within the Canadian Federation” (2010) 49(1) Can. Bus. L.J. 1, at 30.

¹¹⁸ Sionaidh Douglas-Scott, *Constitutional Law of the European Union* (Harlow, U.K.: Pearson Longman, 2002), at 173.

¹¹⁹ Alexis de Tocqueville, *De la démocratie en Amérique*, tome 1 (Paris: Gallimard, 1961), at 150.

alleviated, at least in part, by well-designed institutions and democratic processes ensuring the constant re-legitimation of such institutions.¹²⁰

Second, complementarity in the context of subsidiarity is better envisaged as referring to the above-mentioned objective of systemic safety, which boils down to allowing one level to regulate a matter when demonstration is made that the other cannot efficiently do it.¹²¹ As Dwight Newman puts it, “[a]t no stage does the principle assert a mere complementary power by associations closer to the individual; it contains, indeed, a strong preference for the power of associations closer to the individual over those more distant.”¹²² This preference can be characterized as a *juris tantum* presumption; it can be reversed provided there are sufficient data for doing so. The relation of subsidiarity to “centralization” or “decentralization” is thus merely contingent.

Third, all things considered, it is probably preferable to envisage the principle of subsidiarity as a rule of conflict whose role is to support the implementation of the principle of autonomy inherent to any federal regime. The autonomy in question, which benefits each level of government, is merely relative, however: it is exercisable only within a broader juridical order — the federation — which cannot, and should not, be instrumentalized by any level of government for its own ends.¹²³ The principle of subsidiarity’s role as a conflict rule is evinced by its use for determining which governmental level bears the burden of proof in a

¹²⁰ On the importance of well-designed institutions to ensure the legitimacy of decision-making within federations, see, recently, Jenna Bednar, *The Robust Federation, Principles of Design* (New York: Cambridge University Press, 2009).

¹²¹ Interestingly, McLachlin C.J.C.’s language in *Lacombe*, *supra*, note 63, somehow echoes this logic, and this, in spite of her emphasis on subsidiarity as implying complementarity. Indeed, her language is eerily reminiscent of that used in cases where the national concern branch of the peace, order and good government power is relied upon and which, as alluded to earlier, incorporate a logic of subsidiarity in Canadian law. To wit (at para. 1):

The waters of Gobeil Lake have of late been clouded by conflict. Seeking to preserve the tranquility of their rustic setting, owners of summer homes spurred their municipal government to outlaw an aerodrome on the lake. Anabelle Lacombe and Jacques Picard, the operators of this aerodrome, challenged the validity of the municipal prohibition on the ground that the federal Parliament has exclusive jurisdiction to determine the location of aerodromes. *Thus, the future of aeronautics on Gobeil Lake comes before this Court as a question of federalism, pitting the local interest in land use planning against the national interest in a unified system of aviation regulation.* (emphasis added)

¹²² Newman, *supra*, note 103, at para. 20.

¹²³ J.-F. Gaudreault-DesBiens, “The Canadian Federal Experiment, or Legalism Without Federalism? Toward a Legal Theory of Federalism”, in M. Calvo-Garcia & W. Felstiner, eds., *Federalismo / Federalism* (Madrid: Dyckinson, 2004) 81, at 115.

situation giving rise to its application.¹²⁴ As such, it precludes the highest level of government from arbitrarily deciding to exercise a jurisdiction that local governments may be in a better position to exercise.¹²⁵

A further question raised by the application of the principle of subsidiarity concerns the definition to be given to the notion of “proximity”, which is deeply ensconced in the logic underlying this principle. This question is not peculiar to the Supreme Court of Canada’s musings about subsidiarity, but it informs the Court’s internal debates about this principle. When, in *Reference re Assisted Human Reproduction*, LeBel and Deschamps JJ. argue that “[i]f subsidiarity were to play a role in the case at bar, it would favour connecting the rules in question with the provinces’ jurisdiction over local matters, not with the criminal law power”,¹²⁶ they implicitly associate one level of government’s primary jurisdiction over a field envisaged globally, as opposed to the other level of government’s mere capacity to incidentally affect the same field, to the notion of proximity implied by subsidiarity. The same logic is discernible in Deschamps J.’s dissenting opinion in *Lacombe*, where she states that

the governments that are closest to citizens and have jurisdiction over land use planning should have reasonable latitude to act where the central government fails to do so or proves to be indifferent. They have such latitude as a result, *inter alia*, of the narrower test for protection, that of impairment. In my view, not to consider the practical effect of the legislation in determining whether the activities have been impaired for the purposes of the doctrine of interjurisdictional immunity will have long-term negative consequences.¹²⁷

Here, subsidiarity is referred to as a normative vehicle through which the government that is deemed to be the closest to the citizens (as far as land

¹²⁴ V. Constantinesco, “Le principe de subsidiarité: un passage obligé vers l’Union européenne”, in *L’Europe et le droit, Mélanges en hommage à J. Boulouis* (Paris: Dalloz, 1991), at 41, quoted in Valérie Michel, *Recherches sur les compétences de la communauté* (Paris: L’Harmattan, 2003), at 476.

¹²⁵ If one assumes for the sake of the discussion that *Crown Zellerbach*, *supra*, note 48, and *GMC*, *supra*, note 96, iterate the principle of subsidiarity in the Canadian context, the characterization of this principle as a conflict rule imposing specific evidentiary requirements highlights the remarkably weak evidence that was accepted by the Supreme Court in both cases.

¹²⁶ *Reference re Assisted Human Reproduction*, *supra*, note 62, at para. 273. Transparency requires me to disclose that in reaching that conclusion, LeBel and Deschamps JJ. referred to some of my previous work.

¹²⁷ *Lacombe*, *supra*, note 63, at para. 185.

use is concerned) is somehow given “the benefit of the doubt” when that government is caught in a jurisdictional dispute with the other level of government. Actually, it is as if the former was presumed constitutionally competent *because* of its alleged proximity to the citizens. Moreover, subsidiarity is relied upon to support a restrictive interpretation of a pre-existing doctrine of interpretation, that is, interjurisdictional immunity. By rejecting the “connection argument” invoked by the LeBel and Deschamps JJ. in *Reference re Assisted Human Reproduction*, the group of judges led by the Chief Justice most certainly questions the understanding of proximity underlying Deschamps J.’s approach in *Lacombe*.

In light of the remarks above, LeBel and Deschamps JJ.’s conception of subsidiarity is arguably closer to the common understanding of this principle than that of McLachlin C.J.C. Yet, their lack of mutual understanding about the meaning, scope and consequences of subsidiarity as a principle deemed inherent to federalism only highlights the problems plaguing references to this broader principle since the early 1980s references. Indeed, even when there seems to be an agreement between the members of the Supreme Court as to the potential relevance of a particular principle associated with federalism, their views on the actual impact of that principle on the interpretation of the division of powers may vary widely,¹²⁸ sometimes to the point of being incommensurable. The positivist-voluntarist and generic-historicist conceptions of federalism that divided the members of the Court in the early 1980s still divide its new members today.

V. CONCLUSION

Long before norms collide, there are fractures which flow from culture and sensitivities.¹²⁹

The *Patriation Reference* and the *Quebec Veto Reference* certainly are two of the most important opinions ever pronounced by the Supreme

¹²⁸ An interesting illustration of this can be found in Lamer C.J.C.’s opinion in *Ontario Hydro*, *supra*, note 41, where he agrees with Iacobucci J.’s abstract analysis of the principle-based framework applicable to the case while significantly disagreeing about the application of that framework in the instant case.

¹²⁹ My translation of “Il y a ainsi, bien avant les collisions de normes, des fractures de la culture et de la sensibilité.” See Jean Carbonnier, “Variations sociologiques”, in *Écrits* (Paris: Presses Universitaires de France, 2008) 908, at 910.

Court of Canada. They took place at a time constitutional negotiations were arguably a close second to hockey as Canada's national sport. They also emerged out of an era when Canadians still felt that something had to be done to persuade Quebecers not to leave the federation. Paradoxically, one of these opinions, the *Quebec Veto Reference*, further contributed to the latter's feeling of alienation within Canada. Last, they revealed, if need be, deep fracture lines regarding the interpretation of Canadian federalism. In other words, they "haunt us still".¹³⁰

What is their legacy? On the political front, these opinions remind us of a period of intense constitutional debates that shaped Canadian political life for the decades to come. These opinions were preceded, in 1980, by the first referendum on Quebec sovereignty and followed by a second one in 1995. This last referendum was itself prompted by two failed attempts at amending the Constitution — the Meech Lake and Charlottetown sagas — to undo the political damage resulting from the 1982 patriation of the Constitution without Quebec's approval, a process that was condoned by the Supreme Court in the *Quebec Veto Reference*. In this respect, the *Quebec Secession Reference* can arguably be read as an attempt to restore the Court's battered legitimacy in the post-*Quebec Veto Reference* era before a politically important segment of its audience: Quebec.¹³¹ Yet, the Court's rejection of a Quebec-centric vision of Canadian duality has not been formally reversed. This persisting judicial ambiguity, coupled with the political turmoil that followed the Meech and Charlottetown debacles, has arguably contributed to the deepening of the political rift between Quebec and the other Canadian political communities, a rift that manifests itself as a growing reciprocal indifference. From the perspective of the Canada-Quebec debate and irrespective of one's opinion on its possible outcomes, the Canadian federation, as it currently stands, sociologically speaking, can at best be characterized as a community of comfort.¹³²

¹³⁰ I borrow these words from Stephen Clarkson & Christina McCall, *Trudeau and Our Times, Vol. 1: The Magnificent Obsession* (Toronto: McClelland & Stewart, 1990), at 9.

¹³¹ The use of this notion of "audience" refers to the theoretical framework elaborated by Chaim Perelman in his new rhetoric of law. See, *inter alia*, Chaim Perelman, *Logique juridique, nouvelle rhétorique* (Paris: Dalloz, 1979); Chaim Perelman & Lucie Olbrechts-Tyteca, *Traité de l'argumentation*, 5th ed. (Brussels: Éditions de l'Université de Bruxelles, 2000).

¹³² On this, see J.-F. Gaudreault-DesBiens, "The Fetishism of Formal Law and the Fate of Constitutional Patriotism in Communities of Comfort: A Canadian Perspective", in J.E. Fossum, P. Magnette & J. Poirier, eds., *Ties That Bind: Accommodating Diversity in Canada and the European Union* (Brussels, Bern & Berlin: P.I.E. Peter Lang, 2009) 301.

As far as the law of federalism is concerned, the legacy of the early 1980s references is also rather ambiguous. As was shown in this paper, the two competing conceptions of federalism that then emerged are, subject to minor variations, still informing judicial debates. And although the *Patriation Reference* can possibly be credited for having rekindled the flame of unwritten constitutionalism, albeit in the context of conventions rather than law proper, no real consensus has emerged concerning the particular normative consequences that flow from the principle of federalism. Absent any broadly shared intellectual framework positing the parameters within which this principle is to be understood (as opposed to identifying its specific normative consequences in particular cases), it seems condemned to live a normative life marked by the "unbearable lightness of being".¹³³ In other words, trite it was; trite it risks remaining.

Although one cannot reasonably expect no judicial ambiguity whatsoever on the normative consequences of the principle of federalism in a federation characterized by a multiplicity of often irreconcilable visions of that political regime, is it too much to ask for the judicial identification of stable parameters, which could be called sub-principles, that would frame decision-making when formal constitutional enactments provide little guidance as to how cases raising questions of federalism should be solved? I do not think so. I have expounded in previous papers why, in my view, implicit principles matter; why and when resorting to them is legitimate, and why outright positivist rejections of them are ontologically and hermeneutically flawed; I shall not repeat myself here.¹³⁴ Suffice it to say that it is possible, by referring to theoretical scholarship on federalism and to comparative law, to identify sub-principles consubstantial to federalism. Such sub-principles could provide, in the daily life of a federation, a *deontic* interval within which constitutional powers can, or should, be exercised. These sub-principles, which may have substantial and procedural dimensions, can be derived from the fundamental structural characteristics common to all federations, and adapted to the particular institutional features of the Canadian federation and to

¹³³ I am obviously referring here to Milan Kundera's novel, *The Unbearable Lightness of Being* (New York: Harper & Row, 1984).

¹³⁴ See, *inter alia*, Gaudreault-DesBiens, "Quebec Secession Reference", *supra*, note 57; J.-F. Gaudreault-DesBiens, "Underlying Principles and the Migration of Reasoning Templates: A Trans-Systemic Reading of the *Quebec Secession Reference*", in Sujit Choudhry, ed., *The Migration of Constitutional Ideas* (Cambridge: Cambridge University Press, 2006), at 178.

its political tradition. Moreover, their identification can be inspired by the dynamic that results from the presence of such generic and particular structural characteristics. As well, these sub-principles refer us back to a federation's initial goals; those responsible for individuating them assume an obligation to act in a manner that can reasonably be characterized as fostering those goals, or, to put it negatively, as not unduly undermining the said goals. In this respect, these principles serve as "optimization precepts",¹³⁵ the implementation of which responds to a contextual logic of the possible.¹³⁶ If formal constitutional provisions constitute the grammar of federalism in a particular federation, these sub-principles form its syntax, and may bridge the gaps between text, subtext and context, as well as that between law and politics. Subsidiarity provides a good illustration of a procedural sub-principle of the sort envisaged. Using that example, I want to stress that my contention is not that there can always be agreement as to how subsidiarity may play out in a particular case; it is simply that a shared definition of that principle is possible if one looks at its pedigree and function, and that for the sake of legal consistency and intelligibility, a court such as the Supreme Court should strive to at least agree on the intellectual underpinnings of that sub-principle. This is all the more important given the absence of any consensual conception of federalism in Canada.

This call for a deeper judicial reflection on the normative underpinnings of the principle of federalism seems particularly urgent as the Supreme Court is currently tackling, or is about to tackle, federalism cases that pit against each other values such as autonomy, diversity and efficiency, or interests that are pan-Canadian and provincial.¹³⁷ Taking federalism seriously arguably imposes upon the Court the heavier burden of providing strong rather than merely good reasons in support of its federalism rulings,¹³⁸ which implies making better sense of all the

¹³⁵ See Robert Alexy, *A Theory of Constitutional Rights* (Oxford: Oxford University Press, 2002).

¹³⁶ G. Zagrebelsky, "Ronald Dworkin's Principle Based Constitutionalism: An Italian Point of View" (2003) 1 I-CON 621, at 633.

¹³⁷ The most important is, in my view, the following: *In the Matter of a Reference by Governor in Council concerning the proposed Canadian Securities Act*, P.C. 2010-667 (May 26, 2010).

¹³⁸ Raymond Boudon states that:

[t]he notion of good reasons characterizes situations where a subject agrees with a conclusion because he cannot find a better system of reasons than that which leads him to that conclusion and where he feels an intuitive doubt about the validity of that system. In certain circumstances, this may induce him to look for better reasons. In other circumstances, for example if they suit him, he will live with his doubts. ... One may

potential normative consequences of the principle of federalism. This highlights the penultimate objective underlying the use of such a principle-based approach to federalism: to ensure that federalism-related adjudication is grounded on strong reasons, whatever the outcome,¹³⁹ rather than on mere petitions of principle or deeply entrenched preconceptions, and that it consciously and wilfully opens itself to diverse perspectives on federalism, be they put forward in the name of democracy, efficiency, or of a certain conception of the political community.¹⁴⁰

Such a principle-based approach, I insist, is entirely compatible with the common law’s casuistic methodology, which is irreducible to both constitutional literalism and radical indeterminacy. The legacy of the early 1980s references commands us not to unduly raise our expectations as to what the Supreme Court can do in view of solving complex legal and political questions pertaining to the federation. But it also commands us not to unduly lower them either.

have good reasons to believe in certain legends, especially when they have a functional value; one would not put his hands in the fire to defend them, but, in many cases, there is little interest in refuting them. Moreover, one is reluctant to question them. See Raymond Boudon, *Raison, bonnes raisons* (Paris: Presses Universitaires de France, 2003), at 139 (translation).

¹³⁹ As imposing a search for strong reasons supporting a particular decision over other possible decisions, a principle-based approach to federalism such as that advocated in this paper seeks to avoid ideological determinism at all costs. It is thus neither systematically decentralist nor systematically centralist, and it would certainly be afflicted with a pathology should it become so, as, in such a situation, the very same principle would always trump all competing ones in each and every case. For a reflection on the importance of maintaining a balance in weighing the application of principles deemed inherent to federalism, see J.-F. Gaudreault-DesBiens, “The Irreducible Federal Necessity of Jurisdictional Autonomy, and the Irreducibility of Federalism to Jurisdictional Autonomy” in S. Choudhry, J.-F. Gaudreault-DesBiens & L. Sossin, eds., *Dilemmas of Solidarity: Redistribution in the Canadian Federation* (Toronto: University of Toronto Press, 2006) 185.

¹⁴⁰ See generally, Simeon, *supra*, note 9.

